

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

DEBORA M. BASHORE, for herself)	No. 57182-6-I
and as Personal Representative of the)	
Estate of RANDELL D. BASHORE,)	
)	
Appellant,)	
)	
v.)	
)	
FRASER'S BOILER SERVICE, INC.,)	UNPUBLISHED OPINION
)	
Respondents.)	FILED: September 18, 2006
)	

PER CURIAM. Randell Bashore died of mesothelioma caused by exposure to asbestos. Mr. Bashore's widow, Debora Bashore, brought claims for personal injury and wrongful death against several asbestos product manufacturers and installers. Her action against Fraser's Boiler Service, Inc. was dismissed on summary judgment. The only issue is whether the record supports an inference that Mr. Bashore was employed at Lockheed's Seattle shipyard in 1970. This is a question of fact, and we reverse and remand.

FACTS

Mr. Bashore died of mesothelioma caused by exposure to asbestos. His widow filed this suit for personal injury and wrongful death against several asbestos

product manufacturers and installers, including Fraser's Boiler Service, Inc. (Fraser). Fraser filed a motion for summary judgment, asserting there was no admissible evidence that Mr. Bashore worked in proximity to Fraser's employees while they were working with asbestos-containing products.

In response, Ms. Bashore presented evidence that during the 1970s, Fraser repaired and cleaned boilers on ships at Lockheed's shipyard in Seattle, and that this work gave off significant amounts of asbestos dust. She also presented evidence that due to the environmental dispersal of asbestos, a shipyard worker can develop mesothelioma even if the worker does not work aboard the ships.

Ms. Bashore also presented testimony from experts in epidemiology and mesothelioma, who testified to the likelihood that Mr. Bashore would have had substantial exposure to asbestos at the shipyard, and that such exposure would be sufficient to cause his mesothelioma.

She also produced Mr. Bashore's social security records, which indicated that he worked for Lockheed Shipbuilding Company between July and December 1970. Mr. Bashore's social security records listed Lockheed's location as Woodland Hills, California.

In its reply brief, Fraser questioned whether Mr. Bashore had actually worked in the Seattle shipyard: "Without admissible evidence as to [Mr. Bashore's] workplace, the issue is not one properly placed before a jury." Clerk's Papers at 215. During oral argument, the court also questioned whether Mr. Bashore had worked at Lockheed in Seattle.

The court took the motion under advisement. The next day, Ms. Bashore submitted additional materials to the court. These included a declaration from Mr. Bashore's mother, who testified Mr. Bashore lived in Washington in 1970 and never lived in California; social security records of other Lockheed Seattle workers showing the same employer identification number as that on Mr. Bashore's records, and (for one) showing Lockheed's address as Seattle; and a copy of a 1970 to 1971 Seattle phone book listing a Seattle address for Lockheed Shipbuilding.

The trial court granted the motion for summary judgment, finding "there is insufficient proof that the decedent worked at Todd [sic] Shipyards in 1971 [sic], as there is only a Social Security employment list entry that does not identify the job or the location. In fact, the listing gives an address in California." Clerk's Papers at 272. The supplemental submissions were not listed on the order among the materials reviewed by the court.

Ms. Bashore filed a motion for reconsideration. The court denied the motion, stating:

Plaintiff has not submitted "newly discovered evidence" under CR 59(a)(4) nor indicated what other provision of that rule would apply to this motion. Even assuming proper foundation for the motion, plaintiff's evidence still fails to establish the threshold required to find that the deceased was physically located at the shipyard in 1970.

Clerk's Papers at 301.

DISCUSSION

Supplemental Submissions. It is unclear whether the trial court refused to consider the supplemental submissions, or considered the submissions and still

found the evidence insufficient to raise a question of material fact . Under either scenario, the submissions are properly before this court for review.

A party may file affidavits to assist the court in determining the existence of an issue of material fact until a order granting or denying the motion for summary judgment is entered. Cofer v. County of Pierce, 8 Wn. App. 258, 261, 505 P.2d 476 (1973). Evidence called to the attention of the trial court is properly before the appellate court, whether or not considered by the trial court. Mithoug v. Apollo Radio, 128 Wn.2d 460, 463, 909 P.2d 291 (1996); Goodwin v. Wright, 100 Wn. App. 631, 648, 6 P.3d 1 (2000) (quoting RAP 9.12).¹

It is incumbent upon the moving party to state the grounds upon which summary judgment is sought. White v. Kent Medical Center, Inc., 61 Wn. App. 163, 169, 810 P.2d 4 (1991). Fraser’s motion framed the issue as: “Plaintiff has not produced any admissible evidence that decedent worked in proximity to [Fraser] employees while they worked with asbestos-containing products.” Clerk’s Papers at 18.

Where Bashore worked in the shipyard, and the likelihood of his exposure to Fraser’s asbestos while there, was the clear focus of the motion, and was the issue to which Ms. Bashore responded. Not until its reply brief did Fraser raise the

¹ Fraser relies upon O’Neill v. Farmers Insurance Company, 124 Wn. App. 516, 522, 125 P.3d 134 (2004) (whether to accept or reject untimely filed affidavits is within the trial court’s discretion) and Brown v. Park Place Homes Realty, Inc., 48 Wn. App. 554, 559–60, 739 P.2d 1188 (1987) (same). In those cases, however, the trial court granted a timely motion to strike. Here, no such motion was made. In any event, the materials are appropriate for our review.

question of which shipyard employed Mr. Bashore.²

New issues may not be raised in rebuttal, because the nonmoving party has no opportunity to respond. White, 61 Wn. App. at 168. Here, Ms. Bashore was able to respond only by submitting supplemental materials, which she filed the day after the hearing on the motion. Given the circumstances, the materials were properly submitted and should have been considered.

Further, nothing in the record suggests that Fraser objected to consideration of the supplemental submissions. Fraser thus waived any objection to their consideration on appeal. See Mithoug, 128 Wn.2d at 463; Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979).

The submissions were called to the attention of the trial court and are properly before this court.

Summary Judgment. We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 429, 38 P.3d 322 (2002). Summary judgment is appropriate where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c).

Mr. Bashore clearly worked for Lockheed in 1970. The only reason a

² Fraser’s reply brief stated, “Unless [Ms. Bashore] can establish [by] admissible evidence that [Mr. Bashore] worked at the Lockheed Shipyard in 1970, her claims against [Fraser] fail.” Clerk’s Papers at 216.

question exists as to which shipyard employed him is the fact that his social security records list a California address for Lockheed. But at least two others who worked at the Seattle shipyard had social security records listing the same employer number as that shown on Mr. Bashore's records, and one of those worker's records gives a Seattle location for Lockheed, whereas Mr. Bashore's lists a California location. These discrepancies raise a question as to the weight to be given to the address stated on Mr. Bashore's records. Further, Mr. Bashore's mother declared he lived in Washington in 1970, and never lived in California.

Asbestos plaintiffs can establish exposure to a defendant's products through circumstantial evidence. See, e.g., Lockwood v. A C & S, Inc., 109 Wn.2d 235, 245–48, 744 P.2d 605 (1987); Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 323–25, 14 P.3d 789 (2000). This record allows a reasonable inference that Mr. Bashore worked at Lockheed Shipyard in Seattle and was exposed to asbestos from Fraser products while there. The trial court erred when it dismissed the action.

Reversed and remanded for further proceedings.

FOR THE COURT:

Edington, J

Columen, J

Ajid, J.